APPENDIX

First Opinion of Judge Dooling, January 31, 1964

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

63 C 1281

NETTIE GELFAND and PHILIP GELFAND,

Plaintiffs,

—against—

TANNER MOTOR TOURS, LTD. (a California Corporation), TANNER MOTOR TOURS OF NEVADA, LTD. (a Nevada Corporation), TANNER MOTOR TOURS CORPORATION, LIMITED (a Nevada Corporation), TANNER MOTOR TOURS, LTD. (a Nevada Corporation), TANNER MOTOR TOURS LTD. OF CALIFORNIA (a California Corporation) and LUCKY CAB CO. (a Nevada Corporation),

Defendants.

MEMORANDUM AND ORDER

The summons and complaint have been served on each defendant by delivering a copy to its supposed managing agent here and by delivering another copy to a proper person at the defendants' domicile in California or Nevada. Defendants have moved to quash on juridisdictional grounds.

While defendants' affidavits are most unimpressive and are hardly very frank, and the existence of "Gray Line Sightseeing Companies, Associated," invites allusions to

estoppels-to-deny, what, finally, emerges is the bare, familiar picture of a carrier which performs all its carrier service far from New York and solicits business here through independent travel "agents" or consolidated ticket "agents." The accident out of which the claims arise happened in Arizona.

Not enough is shown to establish jurisdiction. *Hardaway* v. *Illinois Central R.R.*, 9 Misc. 2d 705, 170 N. Y. S. 2d 584; *Internatio-Rotterdam, Inc.* v. *Holland America Line*, 148 N. Y. S. 2d 492; *Greek Tourist Agency, Inc.* v. *Hellenic Mediterranean Lines Co.*, 199 F. Supp. 6; *Vereen* v. *Chicago, Milwaukee, St. Paul & Pacific R.R.*, 209 F. Supp. 919. Cf. *McInnes* v. *Fontainebleau Hotel Corp.*, 257 F. 2d 832; *Dana* v. *Fontainebleau Hotel Corp.*, 34 Misc. 2d 20, 215 N. Y. S. 2d 938. No doubt only a little needs to be added to make out jurisdiction (*Lawson* v. *Pan American World Airways*, 30 Misc. 2d 274, 218 N. Y. S. 2d 822; *Giuliano* v. *Alitalia Airlines, Inc.*, 218 F. Supp. 78; *Del Sesto* v. *TWA*, 201 F. Supp. 879; *Edwards* v. *Atlanta & West Point R.R.*, 197 F. Supp. 686; *Johansen* v. *Gulf and South American S.S. Co.*, 126 F. Supp. 664; but that little is not here.

The contract counts, if they were even literally within the New York process statute (as they are not), would add nothing. The gist of the claims is tort; the tickets do no more than evidence the relation of common carrier and passenger for hire; it is the law of torts that imposes the standard of care and responsibility appropriate to the carrier-passenger relationship, but that standard, and any consequent liability, are not creatures of contract. Cf. *Loehr* v. *East Side Omnibus Corp.*, 259 App. Div. 200, 18 N. Y. S. 2d 529, aff'd 287 N. Y. 670, 39 N. E. 2d 290.

Accordingly, on defendants' motion to quash service, it is

ORDERED that the motion is granted, the action is dismissed and the Clerk is directed to enter judgment that plaintiffs take nothing, and that the action is dismissed for want of jurisdiction without prejudice and without costs.

Brooklyn, New York
January 31, 1964.

JOHN F. DOOLING, JR.
U. S. D. J.

First Opinion, Court of Appeals, Second Circuit, December 9, 1964

No. 83—September Term, 1964.

(Argued October 16, 1964 Decided December 9, 1964.)

Docket No. 28826

NETTIE GELFAND and PHILLIP GELFAND,

Plaintiffs-Appellants,

—v.—

TANNER MOTOR TOURS, LTD. (a California Corporation), TANNER MOTOR TOURS OF NEVADA, LTD. (a Nevada Corporation), TANNER MOTOR TOURS CORPORATION, LIMITED (a Nevada Corporation), TANNER MOTOR TOURS, LTD. (a Nevada Corporation), TANNER MOTOR TOURS LTD. OF CALIFORNIA (a California Corporation) and LUCKY CAB CO. (a Nevada Corporation),

Defendants-Appellees.

Before:

WATERMAN, MOORE and SMITH,

Circuit Judges.

Appeal from an order of the United States District Court for the Eastern District of New York, Dooling, *J.*, dismissing diversity suit for lack of jurisdiction over defendants. Reversed and remanded for further proceedings.

FUCHSBERG & FUCHSBERG (Irving Malchman, Jerome J. Klied, of counsel), New York City, *for Plaintiffs-Appellants.*

O'BRIEN & SHEIL (Denis R. Sheil, William J. Quinlan, of counsel), New York City, *for Defendants-Appellees.*

WATERMAN, *Circuit Judge*:

Plaintiffs, husband and wife, brought suit against the six defendant corporations in the United States District Court for the Eastern District of New York. Jurisdiction was founded on diversity of citizenship, plaintiffs being residents of New York, while defendants are incorporated and have their principal places of business in Nevada and California. Plaintiffs alleged that while riding from Las Vegas, Nevada to Grand Canyon, Arizona in a bus owned and operated by defendants, they were injured when the bus left the highway and crashed into a rock bank. The first three counts in their complaint were based on negligence, the last three on breach of contract of safe carriage. They sought $1,265,000 in damages.

Three of the defendants moved to dismiss the action on the ground that they were not subject to personal jurisdiction in New York. In support of their motion they submitted identical affidavits by two of their officers which consisted of allegations that they had neither representatives nor offices in New York and that they neither solicited nor transacted business in the state. In opposition to the motion, plaintiffs submitted affidavits describing the purchase of their tickets through the Herren-Rogers Travel Service on Long Island, reciting certain representations by the Gray Line Sight-Seeing Companies, Associated, of which defendants are members, and detailing the alleged

business activities of the Gray Line in New York City through Herbert J. DeGraff.

The district court requested these defendants to submit additional affidavits and a copy of the Gray Line tariff. In response, they offered an affidavit by DeGraff relative to his business activities in New York City and his relationship to the Gray Line, an affidavit by an officer of the Gray Line relative to the character of the association and the role of defendants as members, and an affidavit by a partner in Herren-Rogers relative to the particular transaction it had with plaintiffs and the nature of its business generally. Although still somewhat dissatisfied with defendants' presentation, Judge Dooling in a memorandum opinion granted their motion to dismiss the suit. The district court included in its order the three remaining defendants, on the ground that they were mere phantoms. Plaintiffs ask us to reinstate the suit against all six defendants or, at least, to direct a hearing on the question of jurisdiction.

In the absence of a federal statute or rule enlarging the jurisdiction of federal courts, the amenability of a foreign corporation to suit in a diversity case is governed by the constitutionally valid law of the state in which the federal court sits. *Arrowsmith* v. *United Press Int'l,* 320 F. 2d 219 (2 Cir. 1963). Hence the issue presented by this appeal is to be determined in accordance with New York law, insofar as that law is constitutional.

The relevant portions of New York's new Civil Practice Law and Rules provide:

> §301. Jurisdiction over persons, property or status
>
> A court may exercise such jurisdiction over persons, property, or status as might have been exercised heretofore.

§302. Personal jurisdiction by acts of non-domiciliaries

(a) Acts which are the basis of jurisdiction. A court may exercise personal jurisdiction over any non-domiciliary, . . . as to a cause of action arising from any of the acts enumerated in this section, in the same manner as if he were a domiciliary of the state, if, in person or through an agent, he:

1. transacts any business within the state; . . .

The Civil Practice Law and Rules went into effect on September 1, 1963. This suit was commenced on December 15, 1963, but the accident on which it is based occurred on May 4, 1962. That plaintiffs' cause of action thus accrued before the effective date of the act creates no problem of timing as to §301, which only continues prior New York law. But as to §302, which creates a new basis of jurisdiction, we are faced at the outset with the question of whether the new provision was intended to apply to suits commenced after September 1, 1963 based on events which occurred previously, and, if so, whether such retroactive application is constitutional. Fortunately, we are not obliged to prophesy New York doctrine on this question,[1]

---

1 New York law on this question is not yet entirely clear. In *Simonson v. International Bank*, 14 N. Y. 2d 281, 290, 251 N. Y. S. 2d 433, 440 (1964), the Court of Appeals declared:

"[W]ith the possible exception of cases in which the acts serving as the predicate for jurisdiction under the new section are shown to have been carried out in justifiable reliance on the prior law . . ., CPLR §302 has retroactive effect to the extent of embracing suits instituted after its effective date but based on previously accrued causes of action."

The New York courts have yet to inform us whether the "exception" mentioned by the Court of Appeals is actual rather than merely "possible," and, if so, what constitutes an act "carried out in justifiable reliance on the prior law."

or to render a hypothetical constitutional judgment based on that prophecy. See generally Note, *Retroactive Expansion of State Court Jurisdiction Over Persons,* 63 Colum. L. Rev. 1105 (1963). Even if §302 validly applies to this suit with regard to the question of timing, it does not provide a basis of personal jurisdiction over defendants for other reasons yet to be stated.

§301 preserves traditional New York law, under which "a foreign corporation, not authorized to do business in [the] State, was held amenable to local suit only if it was engaged in such a continuous and systematic course of 'doing business' [there] as to warrant a finding of its 'presence' in [the] jurisdiction." *Simonson* v. *International Bank, supra,* 14 N. Y. 2d at 285, 251 N. Y. S. 2d at 436. Once a foreign corporation is found to be "present" within the state, however, "jurisdiction does not fail because the cause of action sued upon has no relation in its origin to the business [there] transacted." *Tauza* v. *Susquehanna Coal Co.,* 220 N. Y. 259, 268, 115 N. E. 915, 918 (1917). See generally N. Y. Legis. Doc. (1958) No. 13, p. 38. The constitutionality of these doctrines has been approved by the Supreme Court. *International Shoe Co.* v. *Washington,* 326 U. S. 310, 318 (1945); *Perkins* v. *Benguet Consol. Mining Co.,* 342 U. S. 437, 446 (1952).

On the other hand, §302 was enacted to take advantage of New York's newly acquired constitutional power, derived from *International Shoe Co.* v. *Washington, supra,* and its progeny, to subject non-residents to personal jurisdiction based on acts occurring within the state. *Simonson* v. *International Bank, supra,* 14 N. Y. 2d at 288, 251 N. Y. S. 2d at 438-39. The provision is apparently based on that portion of *International Shoe Co.* v. *Washington, supra,* 326 U. S. at 318-19, which holds that "the commission of some single or occasional acts . . . in a state" may be enough to render a person amenable to local suit on causes of action which

"arise out of or are connected with the activities within the state." See generally N. Y. Legis. Doc. (1958) No. 13, pp. 39-40. Inasmuch as §302 was seemingly designed to take full advantage of *International Shoe*, that decision, in the absence of authoritative pronouncements by the courts of New York, furnishes us with our guide to interpretation of the new provision, and the provision itself need not present us with an independent issue as to its constitutionality.

Plaintiffs' first contention is somewhat apart from §301 or §302 as discussed above. They argue that under traditional New York law, a foreign corporation which represents to the public that it is doing business in the state is estopped from denying that fact in order to thwart local jurisdiction. The Gray Line makes such representations in its brochures and its tariff and plaintiffs maintain that these representations are imputable to defendants as members of the association. We find it unnecessary to decide whether a doctrine of jurisdiction by estoppel would apply in this case, for we hold that New York apparently has no such doctrine.

Plaintiffs rely on two New York cases, both over twenty-five years old, which conclude that foreign corporations may be estopped by their public representations from denying that service of process was made upon the proper person under New York law. *Society Milion Athena* v. *National Bank of Greece*, 166 Misc. 190, ——, 2 N. Y. S. 2d 155, 164 (Sup. Ct. 1937), *aff'd*, 253 App. Div. 650, 3 N. Y. S. 2d 677 (1938); *Dreher* v. *Western Doll Mfg. Co.*, 198 App. Div. 21, 189 N. Y. Supp. 422 (1921). It is true that these decisions strongly suggest that the same rule applies to a defense based on lack of presence within the state. But the fact remains that we have not found and have not been cited to any square New York precedents to this effect.

On the contrary, recent New York cases pointing out such representations consider them to be but one of several

elements tending to prove that the foreign corporation is doing business in the state. *International Business Machs. Corp.* v. *Barrett Div. Allied Chem. & Dye Corp.*, 16 App. Div. 2d 487, 229 N. Y. S. 2d 547 (1962); *Rochester Happy House, Inc.* v. *Happy House Shops, Inc.*, 14 App. Div. 2d 491, 217 N. Y. S. 2d 791 (1961). Furthermore, there are leading cases involving such representations in which the courts have concluded that the foreign corporation was not subject to personal jurisdiction in New York. *Miller* v. *Surf Properties, Inc.*, 4 N. Y. 2d 475, 176 N. Y. S. 2d 318 (1958); *MacInnes* v. *Fontainebleau Hotel Corp.*, 257 F. 2d 832 (2 Cir. 1958).

§302 seems to work no change in New York law in this respect. It is true that §302 was apparently designed to take advantage of the state's full constitutional powers and it may well be that it is constitutional for the courts of a state to obtain jurisdiction over non-domiciliaries by estoppel. But §302, however, was specifically based on the principles laid down in *International Shoe Co.* v. *Washington, supra,* and its offspring. Those principles, as illuminated by the thoughtful opinion of Judge Kaufman in *Blount* v. *Peerless Chems. (P. R.) Inc.*, 316 F. 2d 695, 697 (2 Cir. 1963), *cert. denied,* 375 U. S. 831 (1963), reflect the view that "when [a corporation's] activities are given protection by state law, it ill behooves the corporation to complain about appearing there to litigate," and that "the state has an interest in subjecting to its judicial process a corporation whose activities in that state expose its residents to a risk of physical harm or economic loss." These views have little if anything to do with a case involving mere representations of presence within the state. Accordingly we hold that the doctrine of jurisdiction by estoppel seems not to be embraced within the purview of §302.

Plaintiffs next contend that their purchase of tickets from defendants through the Herren-Rogers Travel Service on

Long Island was a sufficient basis for local jurisdiction under §302. The facts set forth in the affidavits relating to this branch of the case are ample and undisputed. Herren-Rogers is an independent travel bureau not formally associated with defendants. In March, 1962, plaintiffs made reservations through Herren-Rogers for an extended tour, one small leg of which involved travel on defendants' bus line, and paid a deposit toward the expense of the entire trip. Herren-Rogers forwarded the reservations to the various companies involved and obtained confirmations. Early in April, plaintiffs paid the balance of the cost of the full tour and received, among other things, two tickets for the journey from Las Vegas to Grand Canyon. Herren-Rogers remitted the payment to the various companies involved, withholding its commission.

§302 is limited, insofar as it is relevant, to "a cause of action arising from . . . business [transacted] within the state." We assume for the sake of argument that the sale of the tickets by defendants to plaintiffs through Herren-Rogers was a business transaction within New York. We cannot, however, agree that plaintiffs' cause of action in tort arose from that sale. The alleged negligence of defendants, the subsequent injury to plaintiffs, and every relevant occurrence connecting these two events, all took place three thousand miles from Long Island, New York. It cannot even be said that the duty of due care owed by defendants to plaintiffs arose in New York, for that duty did not finally arise until plaintiffs boarded defendants' bus in Las Vegas. We are referred to no appellate court cases, nor has our own research disclosed any, which uphold jurisdiction over a personal injury claim on anything like such slender grounds. Compare *Singer* v. *Walker*, 21 App. Div. 2d 285, 250 N. Y. S. 2d 216 (1964); *Gray* v. *American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N. E. 2d 761 (1961).

Plaintiffs' claim for breach of the contract of safe carriage stands on slightly firmer ground for such a claim may ordinarily be pleaded as an independent cause of action under New York law. *Kilberg* v. *Northeast Airlines, Inc.*, 9 N. Y. 2d 34, 38, 211 N. Y. S. 2d 133, 135 (1961). Furthermore, it could be argued that jurisdiction over the typical cause of action based upon a bilateral contract may be grounded solely on the fact that the promises of the plaintiff, a resident of the forum state, and his performance pursuant thereto, both took place within the forum state. Cf. *McGee* v. *International Life Ins. Co.*, 355 U. S. 220 (1957).

This is not a typical contract action, however, for as Judge Dooling noted:

> "The gist of the claims is tort; the tickets do no more than evidence the relation of common carrier and passenger for hire; it is the law of torts that imposes the standard of care and responsibility appropriate to the carrier-passenger relationship, but that standard, and any consequent liability, are not creatures of contract. Cf. *Loehr* v. *East Side Omnibus Corp.*, 259 App. Div. 200, 18 N. Y. S. 2d 529 (1940), aff'd, 287 N. Y. 670, 39 N. E. 2d 290 (1941)."

If New York may not assume jurisdiction over the tort claims which are the gist of this suit, it may not take jurisdiction over the contract claims which are derived therefrom. This result is particularly appropriate in the present case, for the promises of "safe carriage" allegedly breached by defendants, like the duty of due care, are creations of the law implicit in the parties' relationship to each other rather than express undertakings they negotiated.

Plaintiffs do not contend that, under §301, defendants are doing business in New York through Herren-Rogers.

Past decisions, involving considerably closer contacts with the state through local travel agents, preclude any such assertion. *Miller* v. *Surf Properties, Inc., supra; MacInnes* v. *Fontainebleau Hotel Corp., supra.* Plaintiffs' attempt to distinguish these cases in another connection on the ground that they did not involve direct payments to the agent within the state, is unavailing. *Gertsenstein* v. *Peninsular & Oriental Steam Nav. Co.*, 202 Misc. 838, 113 N. Y. S. 2d 360 (Sup. Ct. 1952), *aff'd*, 204 Misc. 459, 126 N. Y. S. 2d 439 (App. T. 1953); *Greek Tourist Agency* v. *Hellenic Mediterranean Lines Co.*, 199 F. Supp. 6 (S. D. N. Y. 1961).

Lastly, plaintiffs contend that jurisdiction under §301 or §302 may be based upon the activities conducted for the benefit of defendants by Herbert J. DeGraff. The affidavit of plaintiffs' counsel alleges that from an office in New York City DeGraff distributes brochures and sells tickets for Gray Line tours, including those of defendants, in the same way as does Herren-Rogers. It also points out that the Gray Line, of which defendants are members, represents in its tariff that it has a sales office in New York City at DeGraff's address, and that DeGraff is its "Regional Vice President—Sales Eastern Division." Finally, the affidavit draws attention to the fact that the Gray Line is listed in the New York City telephone directory, and that its name appears on the building directory of the building in which DeGraff's office is located, on one of the doors leading to DeGraff's office, and on the letterhead of certain correspondence emanating from DeGraff's office.

The affidavit of DeGraff, submitted by defendants, makes no mention of ticket sales for Gray Line members, but acknowledges that for a fixed annual fee he publicizes Gray Line tours among independent travel bureaus in the East and helps to arrange group tours on Gray Line facilities. He asserts that he performs similar services at fixed annual fees for numerous other companies in the travel business,

and that the Gray Line telephone number is shared by all the other companies he represents. He claims that his official Gray Line title is merely a public relations device, used in connection with his work for other companies as well. Finally, his affidavit alleges that he staffs, maintains, operates, and pays for his office himself, independently of the Gray Line or any other travel enterprise.

Plaintiffs contend that, under §302, their cause of action arose out of the business transacted in New York by DeGraff on behalf of defendants, because one of DeGraff's activities is to encourage travel bureaus like Herren-Rogers to sell Gray Line tours. We assume for the sake of the argument that this activity constitutes the transaction of business in New York, but, even so, if plaintiffs' cause of action could not arise out of the sale of the tickets, as we have held above, *a fortiori* it could not arise out of the publicity which may conceivably have contributed to that sale.

Plaintiffs also contend that, under §301, defendants are doing business in New York through DeGraff. We agree that DeGraff may perform a wider variety of services for the benefit of defendants than the mere solicitation and facilitation of individual sales, which was about all that was involved in *Miller* v. *Surf Properties, Inc., supra,* and *MacInnes* v. *Fontainebleau Hotel Corp., supra,* which were cases where jurisdiction was found wanting. On the other hand, the formal connection between DeGraff and defendants would appear not nearly as close as the employer-employee relationship which prevailed in *Barnett* v. *Texas & Pac. Ry. Co.,* 145 F. 2d 800 (2 Cir. 1944), where jurisdiction was upheld. See also *Elish* v. *St. Louis Southwestern Ry. Co.,* 305 N. Y. 267, 112 N. E. 2d 842 (1953). Thus, the present case may fall between the leading authorities, pro and con, concerning jurisdiction over foreign travel corporations.

When close questions of jurisdiction arise, each case must be decided on its own facts. *Blount* v. *Peerless Chems. (P. R.) Inc., supra,* 316 F. 2d at 697; *MacInnes* v. *Fontainebleau Hotel Corp., supra,* 257 F. 2d at 833. Unfortunately, the facts set forth in defendants' affidavits relating to this branch of the case are somewhat sketchy. Indeed, their affidavits were characterized by the district court, not only as "most unimpressive," but also as "hardly very frank." While we are reluctant to impose additional burdens on an already overloaded trial bench, we conclude that this case should be remanded to the district court for a hearing on the question of whether defendants are doing business in New York under §301. Hopefully, the hearing will make clear the full scope and importance of DeGraff's activities on behalf of defendants and the closeness of the relationship between DeGraff and defendants through the Gray Line of which defendants are members.

Reversed and remanded for further proceedings in accord with this opinion.

MOORE, *Circuit Judge* (concurring in the result):

I concur in the result only because in practically every jurisdictional case the correct legal answer is best obtained from the fullest possible development of the facts. I do not join in the assumption of my colleagues that DeGraff's public relations activities for Gray Line would or could justify a holding that these operating defendants, merely members of the Gray Line association, were transacting business in New York. Such an activity would be far less a "holding out" than the situations in the *Surf Properties, supra,* or *Fontainebleau Hotel, supra,* cases. Furthermore, DeGraff must be shown in my opinion to have been actively engaged in the type of business on behalf of these particular defendants which would result in jurisdictional conse-

quences for them within the principles of the New York law so well analyzed and stated in Judge Waterman's opinion. I am not opposed to further development of the facts but I am not prepared to intimate (and I do not believe that my colleagues do) that Judge Dooling's views of the New York law were inaccurate or unsound.

Second Opinion of Judge Dooling, December 27, 1966

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

63 C 1281

NETTIE GELFAND and PHILIP GELFAND,

Plaintiffs,

—against—

TANNER MOTOR TOURS, LTD. (a California Corporation), TANNER MOTOR TOURS OF NEVADA, LTD. (a Nevada Corporation), TANNER MOTOR TOURS CORPORATION, LIMITED (a Nevada Corporation), TANNER MOTOR TOURS, LTD. (a Nevada Corporation), TANNER MOTOR TOURS LTD. OF CALIFORNIA (a California Corporation) and LUCKY CAB CO. (a Nevada Corporation),

Defendants.

Appearances:

RICHARD E. SHANDELL, Esq. (Messrs. Fuchsberg & Fuchsberg of Counsel), for plaintiff

DENIS R. SHEIL, Esq. for defendants

DOOLING, *D.J.*

After remand upon the reversal by the Court of Appeals (339 F. 2d 317) of the earlier judgment dismissing the action for want of personal judisdiction, the parties pursued discovery proceedings, and thereafter a hearing was held at which Herbert J. DeGraff testified. On the basis of the evidentiary material as thus amplified the facts re-

lated to the jurisdictional issue are as of December 1963 to have been the following (the present tense is used for simplicity):

1. The action, filed December 5, 1963, is for personal injuries allegedly arising out of an accident to a sight-seeing bus that occurred on May 4, 1962, on State Highway 64 in Arizona during a sight-seeing trip that originated in Las Vegas, Nevada.

2. Copies of the summons and complaint were delivered to a representative of defendants Tanner Motor Tours, Ltd. (a California corporation) and Tanner Motor Tours of Nevada, Ltd. in Los Angeles on December 12, 1963, to a representative of defendant Tanner Motor Tours, Ltd. in Las Vegas, Nevada, on December 9, 1963, and to a representative of Lucky Cab Co. (a Nevada corporation) in Las Vegas, Nevada, on December 9, 1963; in addition copies of the summons and complaint were delivered to Herbert J. DeGraff on January 2, 1964, in New York City for the same three companies.

3. Defendants Tanner Motor Tours, Ltd., Tanner Motor Tours of Nevada, Ltd., and Lucky Cab Co. (hereinafter collectively referred to as defendants) on January 8, 1964, served their joint motion to quash the purported service of summons on the ground that they neither solicit nor transact business in and are not subject to the service of process in New York.

4. None of the defendants has qualified to do business in New York, and none has an office, or telephone listing, or building-directory listing in its name in New York; no officer of any of defendants has his office in New York; and no employee of any of defendants works in New York.

5. Defendants operate motor transportation services of several kinds in the far western states; none of the transportation services that they render extends into, or either originates or terminates in New York.

A. Defendant Tanner Motor Tours, Ltd. (California) operates sight-seeing and charter bus services in Los Angeles, Orange and San Diego Counties in southern California; it also performs certain interstate services of the Tanner Gray Lines, including certain interstate services related to Tanner Motor Tours of Nevada, Ltd.

B. Tanner Motor Tours of Nevada, Ltd. operates sight-seeing, charter and transit bus services in Clark County, and also operates an Avis-Rent-a-Car license service.

C. Lucky Cab Co. operates a taxicab service in Las Vegas and Clark County, Nevada.

6. Defendants are three among a larger number of companies under common ultimate ownership; the "parent" corporation of the group of companies was in 1942 and, apparently, still is Tanner Motor Livery, Ltd.; Tanner Motor Livery, Ltd. is an Avis licensee authorized to use the name Avis in rent-a-car activity in certain southern Californian cities. Tanner Motor Livery, Ltd. is not named as a defendant. [See Rule 15 (c) as amended].

7. The defendants are members of Gray Line Sight-Seeing Companies Associated, Inc. ("Gray Line Associated") and as such are licensed to and do use the words "Gray Line" as a prominent part of their trade names.

8. Gray Line Associated does not operate any sight-seeing or tour services anywhere; it is a membership cor-

poration and operates as a service organization in the interest of its more than ninety members; it conducts national advertising programs on its members' behalf, runs national public relations campaigns in furtherance of the sight-seeing and tour service business of its membership, and contacts travel agents and others to induce them to use the facilities of Gray Line member companies; Gray Line Associated had at all the times in question a contract with Herbert J. De Graff Associated, Inc. ("De Graff Inc.") respecting representation of Gray Line Associated in the eastern United States.

9. Member companies of Gray Line Associated are required to pay dues and defendants paid dues as follows (Lucky Cab Co. paying none and no data being given on other Tanner companies that may be members):

Year	*Tanner Motor Tours, Ltd.*	*Tanner Motor Tours of Nevada, Ltd.*
1960	$24,690.	$3,277.
1961	26,145.	3,850.
1962	26,140.	4,739.
1963	20,950.	2,705.

10. The member companies of Gray Line Associated include companies operating sight-seeing services in cities throughout the United States and in Canada, Mexico, Australia, Hong Kong and Japan.

11. Gray Line Associated arranges for sales service representation in New York (De Graff Inc.), Chicago and San Francisco; the representation obtained in the three cities is over-all representation of Gray Line member companies and the services they offer in relation to travel

agents, retail and wholesale, and in relation to airlines, railroads, hotels, and steamship companies offering other travel services suited for use or packaging with motor tour services; representation of Gray Lines by De Graff Inc. in New York and by the Gray Line Associated representatives in Chicago and San Francisco is not selective representation of particular Gray Line companies as against other Gray Line companies, but of all Gray Line companies.

12. In New York Gray Line Associated is listed as having an office at 501 Madison Avenue. The office referred to is that maintained by De Graff Inc.

13. Gray Line Associated is a Maryland corporation and its principal place of business is in Chicago, Illinois. The Tanner companies form the largest single-ownership group in Gray Line Associated; at the times in question Tanner Gray Lines operated in Los Angeles, San Diego, Santa Barbara, Las Vegas, Phoenix, and Tucson; the Tanner Gray Line companies accounted in the year 1963 for approximately 14 or 15% of the total sight-seeing business of the Gray Line companies.

14. De Graff, Inc. at the times in question had a written contract with Gray Line Associated under which it was retained, for $23,500 a year, payable monthly in advance, "in the promotion and development of [Gray Line Associated's] sight-seeing business"; the duties of De Graff Inc. were:

"a) To represent Gray Line as travel representative and agent in the eastern portion of the United States as specified by Executive Committee directives;

"b) To familiarize itself fully with all services and facilities offered by Gray Line members;

"c) To contact and fraternize with travel forwarders situated in the eastern portion of the United States;

"d) To take orders for folders and other printed material prepared for distribution by Gray Line and Gray Line members;

"e) To gather all available information on specialized group movements and forward such advice to interested Gray Line members;

"f) To compile data on all conventions which will occur in cities where there are interested Gray Line members and forward such reports to such members;

"g) To advise interested Gray Line members of all travel movements and to solicit such business for Gray Line members;

"h) To maintain an office in New York, properly staffed to render the above service and assist in processing all Gray Line orders;

"i) To promote the overall welfare of Gray Line."

The agreement terminated automatically if Herbert J. De Graff was disabled; he was required to devote his best efforts and entire time to advance the interests of Gray Line but he and De Graff Inc. could represent other clients allied with the travel industry if Gray Line Associated's president approved. De Graff Inc. was "retained" under the agreement "as an independent contractor." De Graff Inc. was required to pay "all of its own expenses including the maintenance of a necessary office and the costs of all involved travel."

15. The contract of De Graff Inc. is with the Gray Line Associated. With the exception of the camera transaction (as to which see below) it has never been paid for anything directly by any of the defendant companies, and Herbert J. De Graff is not on the payroll of any of the member companies of Gray Line Associated and is not an officer, director or stockholder of any of the defendants, nor have any of Herbert J. De Graff's companies been stockholders in the defendant companies.

16. In 17 offices around the world De Graff Inc. represents over three hundred clients in the travel business including over 200 hotels and four airlines, and conducts public relations activities for two bus touring companies and Hong Kong Tourist Association.

17. Herbert J. De Graff estimates that the most important work that De Graff Inc. does for the Gray Line Associated is the work with the major wholesale travel agents and the major transportation carriers; with them his salesmen and he arrange package tours containing Gray Line elements. (Exhibit 7 is a "package tour" prepared by Mr. De Graff, but containing no Gray Line elements).

18. In addition to its activities with travel wholesalers and in general solicitation of travel agents for Gray Line business, De Graff Inc. clears reservations for the Grand Canyon Tour of the Gray Line of Las Vegas (apparently a trade name for defendant Tanner Motor Tours of Nevada, Ltd.).

A. Reservations are required on this tour since it includes an outside element, hotel rooms.

B. De Graff Inc. confirms reservations for this tour without obtaining Les Vegas approval until informed from Las Vegas that space is no longer available on a particular tour.

C. Any request for a reservation for more than three or four rooms is considered a request for a group reservation and is never booked without consulting Las Vegas.

19. In each of the years 1962, 1963 and 1964 approximately 3,000 of the 7,000 total passenger reservations on the Grand Canyon tour were cleared through De Graff Inc. The annual value of the bookings the reservations for which were confirmed through De Graff Inc. for the Grand Canyon tour would total approximately $120,000. De Graff Inc. does not handle either payment or actual issuance of the tickets. (Tr. 122-123).

20. Other activities are performed by De Graff Inc. for Gray Line Associated. At the request of a travel agent De Graff Inc. will book transfers to and from hotel, airport or station. (Exhibit 3 is a copy of a transfer reservation booked through De Graff's office). On occasion the office has booked Avis car rentals for the Las Vegas Gray Line, but no commissions are received for that service. De Graff Inc. has also handled some travel agent complaints about Gray Line service and some Gray Line complaints about agents' failure to pay their bills.

21. On behalf of the Gray Line Associated Herbert De Graff arranged for the purchase of 5,000 cameras for Gray Line Motor Tours, Tanner Motor Livery in Los Angeles, California in 1965. No fee was received for this work. The cameras were given away at an airline Christmas party as a gift from the Tanner Gray Line Co.

22. Herbert J. De Graff holds the title of Vice President of Sales for the Eastern Region of Gray Line Associated. That office imposes on him no duties beyond those provided in the contract. (Tr. 101-102).

23. Plaintiffs made their reservations for the Grand Canyon tour through Herren-Rogers Travel Service, Lynbrook, Long Island, New York, as part of an extended tour which included $1,071.26 of billings for transportation and hotel accomodations; Herren-Rogers obtained the Grand Canyon tour confirmations by writing to Tanner Gray Lines, Las Vegas; Herren-Rogers delivered the "Service Confirmation" to plaintiffs on a "Tanner Gray Line Service Confirmation" evidently sent from a Tanner office.

24. Neither De Graff Inc. nor Gray Line Associated but the travel agents are the entities which are primarily engaged in selling such transportation as defendants offer, and who issue tickets or coupons or orders for the transportation service, collect the price, retain a commission and remit the balance to the tour companies.

25. Issuance of tickets, orders or coupons for transportation service, collection and remittance do not pass through the Gray Line Associated or De Graff Inc. organizations; neither Gray Line Associated nor De Graff Inc. is paid a commission for selling specific transportation.

26. The activity of De Graff Inc. in acting as a central reservation office through which travel agents can make or confirm reservations is an alternative to the usually slower and more inconvenient method of having the travel agent communicate directly with the bus line or hotel offering the desired travel service.

27. The Gray Line Associated and De Graff Inc. services to defendants and others similarly situated are in substance general promotional, marketing, advertising and advisory services and, in the case of De Graff Inc., liaison services with travel agents and reservation-coordinating and confirmation services.

28. There is no evidence that and it is not found that Gray Line Associated or De Graff Inc. or Herbert J. De Graff was expected or required to or did act under the direction or control of defendants as would an agent or servant.

29. There is no evidence that and it is not found that Gray Line Associated or De Graff Inc. or Herbert J. De Graff was expected or authorized to or did in any way promote or advance the interests of any one member company of Gray Line Associated in preference to or at the expense of any other Gray Line Associated member company; however Gray Line Associated, De Graff Inc. and Herbert J. De Graff were engaged in promoting and advancing the interests of the member companies of Gray Line Associated as against others offering rival travel attractions.

30. During the years in question C. H. Tanner, president of each of the defendant companies and of Tanner Motor Livery, Ltd., was also president of Gray Line Associated; his presidency ended in October 1964.

31. Tanner Motor Livery, Ltd. has since prior to 1958 been an Avis Rent A Car Inc. licensee in the rent-a-car business in Southern California and Nevada. On various occasions vehicles owned by Livery have arrived in New York and have subsequently been returned to the far west

through rental by local Avis licensees to individuals driving west. During the six months ended April 5, 1966, Avis collected, through its central billing department located in New York, over $10,000 for rentals of cars by Tanner Motor Livery, Ltd. Central billing has existed for Tanner since 1958.

The questions now open for decision are those that arise under New York Civil Practice Law and Rules Section 301 and not those under Section 302 which were disposed of with finality on appeal (339 F. 2d at pages 320-323). The service of process, then, must under Rule 4(d)(7) be tested by the standards applicable to NYCPLR §§301, 313. *Arrowsmith* v. *United Press International,* 2d Cir. 1963, 320 F. 2d 219; *Eck* v. *United Arab Airlines, Inc.,* 2d Cir. 1966, 360 F. 2d 804, 810. *Cf. Cook* v. *Bostitch, Inc.,* 2d Cir. 1964, 328 F. 2d 1.

In words at least, New York has followed *Green* v. *Chicago Burlington & Quincy Ry.,* 1907, 205 U. S. 530 in holding that even if it is "obvious that the defendant was doing . . . a considerable business [in a district] of a certain kind, although there was no carriage of freight or passengers," where the business so done is "nothing more than that of solicitation," that business "is not enough to bring the defendant within the district so that process can be served on it." But while repeatedly treating the *Green* case as relevant and authoritative (although, strictly, it was a federal statutory decision), New York has held that a railroad that neither has lines in New York nor solicits business there may be doing business in New York if a significant part of its managerial activities is carried on in New York (*Pomeroy* v. *Hocking Valley R.R.,* 1916, 218 N. Y. 530, 535-536); it has held that a railroad which has no lines in New York but solicits business there and carries on some managerial activities in New York is doing business

in New York (*Elish* v. *St. Louis Southwestern Ry.*, 1953, 305 N. Y. 267); and it may be thought to have held that jurisdiction will be exercised over an air carrier which has no routes touching New York if it solicits business in New York through another carrier under an elaborate contract entitling the defendant carrier also to a range of services having little evident practical application to New York. *Berner* v. *United Airlines*, 1st Dept. 1956, 3 App. Div. 2d 9, 157 N. Y. S. 2d 884, aff'd., 1957, 3 N. Y. 2d 1003. But where the New York Court has been satisfied that there was "mere solicitation" of business for an out-of-state hotel, and little, if anything more, and that the solicitation was carried on through one who made a business of such solicitation for a number of hotels, the Court has declined jurisdiction. *Miller* v. *Surf Properties, Inc.*, 1958, 4 N. Y. 2d 475. *Cf. MacInnes* v. *Fontainebleau Hotel Corp.*, 2d Cir. 1958, 257 F. 2d 832; *Turner* v. *Jack Tar Grand Bahama, Ltd.*, 5th Cir. 1965, 353 F. 2d 954.

Bryant v. *Finnish National Airline*, 1965, 15 N. Y. 2d 426 marks an evident departure. It cannot be regarded as presenting decisively different facts from those in *Green* v. *Chicago, Burlington & Quincy Ry., supra;* its evident purpose is to discard the "mere solicitation" and "solicitation plus" technique of factual analysis and, without disturbing previous holdings, to substitute "a simple pragmatic" test. Jurisdiction over an airline with no routes touching New York was sustained although its local activity was "mere solicitation" plus an evidently trifling amount of intimately related activity. The *Miller* case was distinguished on the ground that the local solicitor represented many hotels. The *Berner* case was invoked as also involving an airline with no route touching New York, and it was noted that the passenger killed in the

crash of the airliner in the *Berner* case had bought his ticket in New York from another corporation "which was the general sales and traffic agent in New York City" of the foreign airline. The Court closed its discussion in the *Bryant* case by saying in summary that defendant had a leasehold, employees, and a bank account in New York, and that the New York office conducted some public relations and publicity, maintained liaison with other airlines and with travel agencies, forwarded requests for reservations to Europe, and helped to generate business. The activities so described constitute solicitation without any definable or measurable addition. *Eck* v. *United Arab Airlines, Inc.*, 2d Cir. 1966, 360 F. 2d 804, 810-811, may be taken to note and give effect to the change in emphasis introduced by the *Bryant* case. It is difficult to avoid the conclusion that the New York Court has at length precisely rejected the exact holding of the *Green* case. *Cf. Turner* v. *Jack Tar Grand Bahama Ltd., supra,* 353 F. 2d at 956.

However, the Court's discussion of the *Miller* case and its emphasis on the directness of Finnish National Airline's activities in this state do not suggest that such advantages as defendants unquestionably derived from the local activities of the travel agents, Gray Lines Associated and De Graff will automatically take the place at the sort of direct relation displayed in the *Finnish National Airline* case. There must be, it would appear, some integrating factor, like directness of control, or the formalization of service, obligations of the kind covered by explicit contract in the *Berner* case, to establish the sort of continuity and substantiality of relation that, by pragmatic testing, leads to the conclusion that defendants should be suable in New York.

The Gray Line Associated-De Graff Inc. activity here presented is too generalized, collateral and indirect. Its characterizing elements are that it is neither directly controlled by defendants, nor is it integral to defendants transactions of sale, nor is it particular to defendants, but it is an independently constituted set of activities, related primarily to overall sales promotion, and general to the ninety Gray Line companies, and, in the case of De Graff Inc. activity, to many hotels and a certain number of other carriers. No doubt the case presents, as do all cases of this class, the evident fact that through these means defendants promote the marketing in New York to New Yorkers of a service that is rendered elsewhere. But that is not enough, perhaps because it can be done, and done effectively, through others without any "presence" of the defendant in New York, and it is the super-addition of something that is "presence" (as in the *Bryant* case), or substitutional presence (as in the *Berner* case through elaborated contract service), that makes the difference between being subject to and being freed of local jurisdiction. *Cf. Hanson* v. *Denckla,* 1958, 357 U. S. 235, 253-254; *Eck* v. *United Arab Airlines, Inc., supra,* 360 F. 2d at 811.

The relation of Herbert J. De Graff and of De Graff Inc. to defendants is not of the kind that satisfies the pragmatic test of the *Bryant* case. The camera transaction is not germane; it was a random episode and not a transaction in the regular course of the business of Tanner or of De Graff or of the New York office of De Graff Inc. The De Graff activities were not so directly related, so intrinsic to the business of defendants as was the activity of the travel agents. While no doubt valuable to the ninety Gray Line companies and particularly to Tanner Motor Tours of Nevada, Ltd. in relation to the Grand Canyon

tour, the DeGraff services were not in the main stream of ticket selling. The reservation clearing house was to the travel agents a convenience rather than a necessity (for they could by-pass De Graff Inc. in making reservations). The services were, otherwise, directed to the more general promotion of good will and business relations and the devising of new tour-arrangements; they were comparable to the services offered by one who—like a public relations man, or management consultant, or industrial designer—makes a calling of practising a particular expertise for those who are prepared to engage his services. In addition, the De Graff services were rendered to others as well as to defendants, they were rendered to defendants only equally and simultaneously with their being rendered also and on the same terms to other Gray Line companies, and they were rendered only indirectly through the Gray Line Associated relation.

The Gray Line Associated arrangement was not of the kind that could, analogously to the *Berner* case, transform Gray Line Associated into a local co-operative directly representative of each Gray Line member company. The evidence of Gray Line Associated activity is very slight and what evidence there is marks it as not performing any activities in New York relevant to the present issue except as the De Graff Inc. activities, already discussed, are treated as also being activities of Gray Line Associated.

The facts relating to the Tanner Motor Livery, Ltd., relation to Avis are theoretically intriguing, but there is no foundation here for the suggestion that if Tanner Motor Livery, Ltd. is doing business in New York, its supposed subsidiaries must also be doing business here. Contrast *Turner* v. *Jack Tar Grand Bahama, Ltd., supra* 353 F. 2d at 956, and *Walkovsky* v. *Carlton,* 1966, —— N. Y.

2d ——, 35 L. W. 2330, with *Taca International Airlines, S. A.* v. *Rolls Royce of England, Ltd.*, 1965, 15 N. Y. 2d 97.

An over-view may suggest that the concourse of all the elements present on any truly pragmatic test should lead to the conclusion here that defendants are suable in New York. But the case is not really a close one although it has been hotly contested. The diligence of counsel in arraying and analyzing the data shows that what is here is refinement of scrutiny rather than substantiality of activity. Once it is concluded that defendants offering a wholly out-of-state service are not suable in New York merely because they exploit New York as a market through the local network of travel agencies, the search for the added factors that will make such a defendant suable must produce something more substantial than such indirect, generalized and shared promotional facilities as defendants here utilized. *Cf. Miller* v. *Surf Properties, Inc., supra; Guile* v. *Sea Island Co.*, N. Y. Co. 1946, 11 Misc. 2d 496, 66 N. Y. S. 2d 467, aff'd., 1st Dept. 1947, 272 App. Div. 881, 71 N. Y. S. 2d 911; *MacInnes* v. *Fountainebleau Hotel Corp. supra; Wiederhorn* v. *The Sands, Inc.*, S. D. N. Y. 1956, 142 F. Supp. 448. See *Alfa* v. *Compagnie Generale Transatlantique*, E. D. Mo. 1963, 228 F. Supp. 874.

It is tragic that federal courts continue to "try" unreal issues of "jurisdiction." *Cf. First Flight Co.* v. *National Carloading Corporation*, E. D. Tenn. 1962, 209 F. Supp. 730, 735 *et seq.* As the 1963 amendment to Rule 4 as affecting "additional parties" again demonstrates, federal process has no genuine concern with state boundaries or factitious problems of "jurisdiction" invented as parodies of state law realities. The only substantial issue in every such case as the present one is not "jurisdiction" but proper place of trial. Yet if process were sustained here or is sus-

tained on appeal, that threshold and real issue—proper place of trial—would still be unadjudicated. The hopeful avenues of thought at least opened by *Goldlawr, Inc.* v. *Heiman,* 1962, 369 U. S. 463, appear to open no prospect here, since the case is in the correct district under 28 U. S. C. §1391(a) and is therefore not transferable under 28 U. S. C. §1406(a). But that case invites the conclusion that in every such case as this the interests of justice require that the federal courts be empowered to proceed at once in the worthwhile function of determining the proper place of trial under 28 U. S. C. §1404(a). To borrow the disabilities that the fourteenth amendment imposes on the state courts—with ever diminishing rigor—and labor to imitate their involuntary and unwanted defects of power, is not sensible, and it serves no federal purpose.

On defendants' motion to dismiss the action for want of personal jurisdiction, it is

ORDERED that the action be dismissed for want of jurisdiction and the Clerk is directed to enter judgment that plaintiffs take nothing and that the action is dismissed without prejudice and without costs for want of jurisdiction.

Brooklyn, New York
December 27, 1966.

JOHN F. DOOLING, JR.
U.S.D.J.

Second Opinion of Court of Appeals, Second Circuit, November 13, 1967

No. 77—September Term, 1967.

(Argued October 13, 1967 Decided November 13, 1967.)

Docket No. 31156

NETTIE GELFAND and PHILLIP GELFAND,

Plaintiffs-Appellants,

—v.—

TANNER MOTOR TOURS, LTD. (California Corporation), TANNER MOTOR TOURS OF NEVADA, LTD. (Nevada Corporation), TANNER MOTOR TOURS CORPORATION, LIMITED (a Nevada Corporation), TANNER MOTOR TOURS, LTD. (a Nevada Corporation), TANNER MOTOR TOURS, LTD. OF CALIFORNIA (a California Corporation) and LUCKY CAB CO. (a Nevada Corporation),

Defendants-Appellees.

Before:

LUMBARD, *Chief Judge,*
SMITH and FEINBERG, *Circuit Judges.*

Appeal from judgment of the United States District Court for the Eastern District of New York, John F. Dooling, Jr., *J.*, dismissing the action for want of personal jurisdiction over defendants.

Reversed.

RICHARD E. SHANDELL, New York, N. Y. (Fuchsberg & Fuchsberg, New York, N. Y., on the brief), *for plaintiffs-appellants.*

WILLIAM J. QUINLAN, New York, N. Y. (Denis R. Sheil, New York, N. Y., on the brief), *for defendants-appellees.*

LUMBARD, *Chief Judge*:

The sole question on this appeal is whether defendant corporations are doing business in New York through their promotional representative, Herbert J. DeGraff, so as to give the district court personal jurisdiction over them under traditional principles of New York law as preserved by §301 of New York Civil Practice Law and Rules. All other grounds for *in personam* jurisdiction over defendants were considered and rejected in an earlier opinion of this court, 339 F. 2d 317 (2 Cir. 1964) when we remanded the case for further findings on the issue now before us. On remand, the district court again found that defendants' activities in New York were not sufficient to warrant a finding that they were doing business in New York. Upon the additional evidence now before us and in light of a New York opinion written after the decision below, we reverse.

The plaintiffs, New York residents, brought suit for injuries sustained on May 4, 1962 when a wheel broke off a Gray Line bus in which they were riding in Arizona en route from Las Vegas to the Grand Canyon. Mr. and Mrs. Gelfand sued six corporate defendants. Three defendants have moved to dismiss the complaint. Although the other three named defendants did not appear the district court dismissed the action against all six defendants. The three

moving defendants are Tanner Motor Tours, Ltd. (California), Tanner Motor Tours of Nevada, Ltd. and Lucky Cab Co. Tanner (California) operates sightseeing and charter bus services in Southern California and also performs interstate services for Tanner (Nevada). That corporation operates sightseeing and charter bus service in Clark County, Nevada, and also operates a car rental agency. The district court assumed, but did not make a finding, that Tanner (Nevada) operated the Grand Canyon tour. The record leaves open the possibility that Tanner (California) operated some or all of the tour buses. Lucky Cab Co. operates a taxicab service in Las Vegas and Clark County, Nevada. Defendants are related companies under common ownership. The parent company is Tanner Motor Livery, Ltd., not named as defendant in this suit.

The moving defendants also are members of Gray Line Sight-Seeing Companies Associated, Inc., a non-profit membership corporation organized under Maryland law. As such they are licensed to use the words "Gray Line" in promoting their tours. Gray Line Associated does not operate any sightseeing or tour services of its own. Its expenses are met from dues paid by more than 90 members. The Tanner companies account for approximately 14 or 15% of the total sightseeing business of the Gray Line companies.

Gray Line Associated conducts national advertising programs and public relations campaigns and contacts travel agents to induce them to use its members' facilities. It has a contract with Herbert J. DeGraff Associated, Inc. to act as its sales service representative. In New York, Gray Line Associated is listed at an office maintained by DeGraff Associated, Inc. at 501 Madison Avenue. Mr. Herbert J. DeGraff holds the title of Vice President of Sales for the

Eastern Region of Gray Line Associated. However that position imposes no duties on him beyond those provided in the contract between Gray Line Associated and his organization. In consideration of an annual fee of $23,500, DeGraff Associated, Inc. agreed:

"A. To represent Gray Line as travel representative and agent in the Eastern portion of the United States as specified by Executive Committee directives;

"B. To familiarize itself fully with all services and facilities offered by Gray Line members;

"C. To contact and fraternize with travel forwarders situated in the Eastern portion of the United States;

"D. To take letters for folders and other printed material prepared for distribution by Gray Line and Gray Line members;

"E. To gather all available information on specialized group movements and forward such advice to interested Gray Line members;

"F. To compile data on all conventions which will occur in cities where there are interested Gray Line members and forward such reports to such members;

"G. To advise interested Gray Line members of all travel movements and to solicit such business for Gray Line members;

"H. To maintain an office in New York properly staffed to run the above services and assist in processing all Gray Line orders;

"I. To promote the overall welfare of Gray Line."

The agreement would terminate automatically if Herbert J. DeGraff was disabled. DeGraff Associated represents

many other clients in the travel business besides Gray Line Associated.

The court below found that DeGraff Associated was retained as an independent contractor by Gray Line Associated. Mr. DeGraff did not receive direct payment from any of the defendants for any of the services he performed and he is not on the payroll of any of them nor an officer, director or stockholder of any of them. There was no evidence that DeGraff or his corporation were under the control of defendants or that Gray Line Associated was under the control of Tanner, although the president of the Tanner corporations, C. H. Tanner, was also president of Gray Line Associated until October 1964.

Mr. DeGraff's most important work for Gray Line Associated was in arranging package tours with major wholesale travel agents and transportation carriers. However DeGraff also provided a special service for whichever defendants ran the Grand Canyon tour. Although under no contractual obligation to the Tanner corporations, DeGraff Associated cleared reservations for the Grand Canyon tour. Until informed by Gray Line of Las Vegas, the promotional name used by defendants who operated the Grand Canyon tour, that space was no longer available, DeGraff confirmed reservations, except group reservations, without obtaining Las Vegas' approval. In 1962, 1963 and 1964, approximately 3,000 of 7,000 total annual passenger reservations on the tour were cleared and confirmed by DeGraff. The value of the bookings confirmed through DeGraff Associated each year was approximately $120,000. Six of DeGraff's clerks spent part of their time working on Grand Canyon reservations. Mr. DeGraff testified that without his reservation service the tour could not be effectively merchandised.

The amenability of the defendant corporations to suit in a federal diversity action is governed by the law of the

state in which the federal court sits, unless it should be found not to comply with constitutional requirements. *Arrowsmith* v. *United Press International,* 320 F. 2d 219 (2 Cir. 1963). This suit, having been brought in the Eastern District of New York, we must look to New York law.

New York's highest court recently said in *Frummer* v. *Hilton Hotels International, Inc.,* 19 N. Y. 2d 533, 281 NYS 2d 41, 43-44 (1967):

> "A foreign corporation is amenable to suit in our courts if it is 'engaged in such a continuous and systematic course of 'doing business' here as to warrant a finding of its 'presence' in this jurisdiction. . . . (See, e.g., Bryant v. Finnish Nat. Airline, 15 N. Y. 2d 426, 430, 260 N. Y. S. 2d 625, 627, 208 N. E. 2d 439, 400 . . . . ; Berner v. United Airlines, 3 N. Y. 2d 1003, 170 N. Y. S. 2d 340, 170 N. Y. S. 2d 340, 147 N. E. 2d 732 . . . .) Although 'mere solicitation' of business for an out-of-state concern is not enough to constitute doing business (Miller v. Surf. Prop., 4 N. Y. 2d 475, 480, 176 N. Y. S. 2d 318, 320, 151 N. E. 2d 874, 876. See International Shoe Co. v. State of Washington, 326 U. S. 310, 315, 66 S. Ct. 154, 158 . . .), due process requirements are satisfied if the defendant foreign corporation has 'certain minimum contacts with [the State] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'." (*International Shoe Co.* v. *State of Washington,* 326 U. S. 310, 316, 66 S. Ct. 154, *supra; see Simonson* v. *International Bank,* 14 N. Y. 2d 281, 286, 251 N. Y. S. 2d 433, 436, 200 N. E. 427, 429, *supra.*) (Citations partially omitted.)

Judge Dooling found that there was no personal jurisdiction over the defendant corporations because their con-

tacts with New York through Gray Line Associated and DeGraff Associated lacked "some integrating factor, like directness of control, or the formalization of service, obligations of the kind covered by explicit contract in the Berner case, to establish the sort of continuity and substantiality of relation that, by pragmatic testing, leads to the conclusion that defendants should be suable in New York." The *Frummer* case, decided after Judge Dooling's opinion, indicates that DeGraff's activities included the "integrating factor" which the district court believed lacking.

In *Frummer* v. *Hilton Hotels International, Inc., supra,* plaintiff was injured in the London Hilton Hotel. He sued Hilton Hotels (U. K.) Ltd., lessee and operator of the hotel and a British corporation, in New York. The New York Court of Appeals found that the corporation was doing business in New York "in the traditional sense" because the same services which were provided by the New York office of the defendant in the *Bryant* case, *supra,*[1] were provided for the defendant in *Frummer* by Hilton Reservation Service, a non-profit corporation owned in common by the Hilton corporations. In addition, unlike defendant's New York office in *Bryant,* Hilton Reservation Service accepted and confirmed reservations. The court in *Frummer*

---

1 In *Bryant* v. *Finnish National Airlines, supra,* defendant corporation was held subject to personal jurisdiction in New York even though it did not fly planes outside of Europe. Defendant's only contacts with New York were through maintenance of a one and a half room office in New York City staffed by four employees. The court stated that "the test for 'doing business' is and should be a simple and pragmatic one . . . ." 15 N. Y. 2d at 432, 260 N. Y. S. at 629. The court's simple and pragmatic holding was that having a lease on a New York office, employing four people, having a bank account with an average balance less than $2,000, doing public relations and publicity work including maintaining contacts with other airlines and travel agencies and transmitting requests for space to Europe and helping to generate business in New York "should be enough."

specifically disavowed any reliance upon the corporate relationship of the two Hilton subsidiaries other than that "it gives rise to a valid inference as to the broad scope of the agency in the absence of an express agency agreement such as the one which existed in the *Berner* case." 281 N. Y. S. 2d at 45.

The *Frummer* opinion distinguished *Miller* v. *Surf Properties, supra,* upon which the district court in this case relied. In *Miller,* plaintiff was injured in a Florida hotel owned and operated by defendant and brought an action in New York. Plaintiff claimed that defendant had sufficient contacts with New York to be subject to suit because of an oral agreement with Broadway Resort Service. Telephones at Broadway's New York office were listed in the names of between 40 and 50 hotels. For an annual fee of $750.00 Broadway answered inquiries and forwarded requests for space to Florida for approval. Reservations did not become final until accepted by the hotel in Florida. The *Frummer* court stated that in *Miller* the services performed in New York amounted to little more than rendering telephone service and mailing brochures. Without confirmation of reservations by the New York agent this was "mere solicitation."

In our view, the decisive test is that upon which the court in *Frummer* relied, "the [reservation] Service does all the business which [defendant corporation] could do were it here by its own officials." 281 N. Y. S. 2d at 44. In the context of the *Frummer* case, we take this to mean that a foreign corporation is doing business in New York "in the traditional sense" when its New York representative provides services beyond "mere solicitation" and these services are sufficiently important to the foreign corporation that if it did not have a representative to perform

them, the corporation's own officials would undertake to perform substantially similar services.

Mr. DeGraff testified that the reason his office booked reservations for Tanner's Grand Canyon tour was that "this was the only way that you could merchandise that tour of the Grand Canyon." It is clear from the record that unless defendants had arrived at this working arrangement with DeGraff or a similar arrangement with some other New York representative, they would either have had to open their own reservation office in New York or give up the Grand Canyon tour. Since DeGraff confirmed the tour reservations in New York and in addition maintained a broad range of services similar to those of Hilton Reservation Service or the New York office of defendant corporation in the *Bryant* case, whatever DeGraff's relationship to the other members of the Gray Line Association might be, DeGraff was acting as an agent for the Tanner company or companies operating the Grand Canyon tour to a sufficient extent to satisfy the doing business test as stated by the New York Court of Appeals in the *Frummer* case.

We conclude that Tanner's reliance upon DeGraff Associated for three-sevenths of its business on the Grand Canyon tour, generating $120,000 a year in bookings confirmed in New York is sufficient contact with New York to satisfy the due process requirements of *International Shoe Co.* v. *State of Washington,* 326 U. S. 310 (1945), and establish a systematic course of doing business in New York by the Tanner corporations participating in operation of the Grand Canyon tour. As the New York court noted in *Frummer,* "We are not unmindful that litigation in a foreign jurisdiction is a burdensome inconvenience for any company. However, it is part of the price which may properly be demanded of those who extensively engage in

[interstate] trade. When their activities . . . through an agent, become as widespread and energetic as the activities in New York conducted by [defendant], they receive considerable benefits from such . . . .business and may not be heard to complain about the burdens." 281 N. Y. S. 2d at 45.

We are not called upon to consider the merits of the policy expressed by New York's test for *in personam* jurisdiction over foreign corporations which, being constitutionally permissible, is binding upon us. The question of whether or not the Eastern District of New York is an appropriate forum, as opposed to the question of whether or not it is a permissible forum, is not before us.[2]

The district court has *in personam* jurisdiction over the defendant corporation or corporations which operated the Grand Canyon tour under the name "Gray Lines of Las Vegas." As to those defendants who operated the Grand Canyon tour the judgment of the district court is reversed.

---

2 Of course defendants are free to raise the question of the appropriateness of the forum by moving under 28 U. S. C. §1404(a) to transfer the action to a more convenient forum upon remand to the district court.